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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

WILSON TONY HARRELL,

Petitioner

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the
United States Court of Appeals for
the Eleventh Circuit

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QUESTION PRESENTED

Where 21 U.S.C., § 846 provides that the maximum penalty for the crime of conspiracy shall not exceed the maximum punishment prescribed for the offense which is the object of the conspiracy, may a criminal defendant be lawfully sentenced to a fifteen year term of imprisonment when convicted of conspiracy to possess with intent to distribute one or more of several controlled substances, only one of which (cocaine) imputes a fifteen year sentence to the conspiracy, while the other substances (methaqualone, amphetamine, and methamphetamine) impute a five year maximum sentence.

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STATUTORY PROVISIONS

21 U.S.C. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 841 provides:

> (a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally --
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
> >
> > (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.
>
> (b) Except as otherwise provided in section 405 [21 USCS § 845], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I of II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior

conviction, impose a special parole term of at least 6 years in addition to such term if imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph

shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on July 30, 1984.

CITATIONS TO OPINION BELOW

The decision of the Court of Appeals dated July 30, 1984, and reported at 737 F.2d 971 (11th Cir. 1984) is found in Appendix "A" to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

On June 11, 1982, in the Middle District of Florida, petitioner was convicted of conspiracy to possess with intent to distribute certain controlled substances, possession with intent to distribute cocaine, and a Travel Act violation related thereto.

Of pertinance to this petition for writ of certiorari, Count I of the indictment charged various individuals, including petitioner with conspiring to:

> "possess with intent to distribute certain controlled substances, including:
>
> (a) Cocaine, a controlled substance and narcotic drug;
>
> (b) Methaqualone, a Schedule II controlled substance; and
>
> (c) Amphetamine and Methamphetamine, Schedule II controlled substances."

With respect to the conspiracy charge,

the trial court instructed the jury as follows:

> "Title 21, U.S.C., § 846, cited in Count One of the Indictment, provides in pertinent part as follows:
>
> > 'Any person who . . . conspires to commit any offense [prohibited by § 841(a)(1)] [commits an offense against the United States].'
>
> So, under this law a 'conspiracy' is a combination or agreement of two or more persons to join together to attempt to accomplish an offense which would be a violation of Title 21, U.S.C., § 841(a)(1) making it unlawful for any person to knowingly and willfully possess the substances Methaqualone, Amphetamine, Methamphetamine, or Cocaine with intent to distribute, that is, transfer or deliver possession of the substance to any other person." [Emphasis added].

The trial court clearly framed its instruction in the disjunctive. That is, the jury was instructed that the evidence need only show that the conspirators

intended to possess any one of the drugs in order for there to be a conviction. Neither the government nor the defendant requested a special or interrogatory verdict.

However, following the general guilty verdict as to the conspiracy, the government announced its position that since one of the drugs enumerated in the conspiracy, cocaine, was a "narcotic", that a maximum sentence of fifteen years was allowed rather than the five year maximum provided for conspiracy to possess any one of the other enumerated drugs.

In responsive memoranda and argument before the trial court, petitioner argued that absent a special verdict form it was simply impossible to tell which controlled substance or substances were found by the jury to be involved in the conspiracy. Under these circumstances, due process considerations would prohibit any specula-

tion or assumption that the jury found the most punitive theory, i.e., cocaine as the objective, under which they might return a general verdict of guilty.

Over petitioner's objection, the trial court nonetheless imposed a fifteen year sentence on the conspiracy count consecutive to the fifteen year sentence and five year sentence imposed, respectively, as Counts II and III.

On July 30, 1984, the Eleventh Circuit Court of Appeals affirmed Harrell's conviction and sentence. Notwithstanding petitioner's trial level objection to the sentence, the court found that petitioner failed to "raise this issue at trial, through either an objection to the form of the indictment, a request for a special verdict, [citation omitted] or an objection to jury instructions. Since the imposition of such a sentence does not amount to clear

and prejudicial error, reversal in the absence of an objection is not warranted." [App.A, pp. A-35-36].

REASONS FOR GRANTING THE PETITION

As long as the sentencing scheme provided by 21 U.S.C., § 846 remains in effect, the controversy presented hereby will inevitably recur. That section adopts as its own the sentencing maximums provided elsewhere in Title 21 for those substantive crimes that are the object of any given conspiracy.

As is very often the case, especially in drug related conspiracies, there was more than one object of the conspiracy with which petitioner was charged. He was charged with conspiring to possess with intent to distribute cocaine, methaqualone, amphetamine, and methamphetamine. Only one of these alleged objectives of the conspiracy was a narcotic drug, cocaine, which carried a penalty of fifteen years to which he was sentenced by the trial court. The other objectives carried a

maximum penalty of five years imprisonment. 21 U.S.C., § 841(b)(1)(A) and 21 U.S.C., § 841(b)(1)(B).

This does not mean that the indictment was duplicitous. Only one conspiracy was alleged. Of course, the essential element of a conspiracy is an agreement and it may embrace the commission of several substantive offenses. An indictment which charges a single conspiracy to commit several different violations is not duplicitous. See, e.g., United States v. Grassi, 616 F.2d 1295 (5th Cir. 1980); United States v. Morrow, 717 F.2d 800 (3d Cir. 1983), cert. denied, 104 S.Ct. 975 (1983).

Rather, because of the peculiar statutory approach, the question is properly analyzed as what is the appropriate sentence for a single charged crime. Indeed, the defendant here seeks reversal of his conspiracy conviction

only as a possible alternative to resentencing in accord with the less punitive maximum penalty provided for possession with intent to distribute the three controlled substances other than cocaine described as objects of the conspiracy.

This was the approach taken by then Circuit Judge Burger writing for the court in Brown v. United States, 299 F.2d 438 (D.C. Cir. 1962), one of the earliest cases to address this issue. See also, United States v. Shackleford, 180 F.Supp. 157 (S.D.N.Y. 1957).

This same approach was employed in United States v. Quicksey, 525 F.2d 337 (4th Cir. 1975). In that case the defendant was convicted of a single conspiracy alleged in the indictment which referred to both the general conspiracy statute, 18 U.S.C., § 371, and to the more punitive narcotics conspiracy statute, 21 U.S.C., § 846. Under the trial

court's charge to the jury which allowed a conviction upon proof of either a Travel Act violation or a violation of the substantive Drug Act, the court found that absent a special verdict:

> ". . . it is not possible to ascertain whether the jury intended to find the defendants guilty of conspiracy to violate the Travel Act or the Drug Act or both Acts". 525 F.2d 337, 341.

In both Brown and Quicksey the court allowed the government to elect between reversal or resentencing under the less punitive statute because of their finding, as would be appropriate here, that there was evidence from which a jury might find guilt as to the more punitive object of the conspiracy. If the government desires to seek a conviction on the more punitive theory, it might do so by amendment of pleading or use of special verdict at a retrial. However in each of these cases, the court declined to construe a general

guilty verdict as a finding of guilt on the most punitive theory embraced within a single multi-objective conspiracy count.

Though neither case turned on consideration of such issues, both Brown and Quicksey might arguably be harmonized with the case at bar because of the reference in each to some effort by the defendant at trial to particularize the government's theory. In Brown there was a request for a special verdict. In Quicksey the defendant sought an election of theories.

In the case at bar, the Court of Appeals held that, notwithstanding his vigorous objection at sentencing, the petitioner failed to preserve the error asserted herein by his failure to object to the indictment, the instructions, or to request a special verdict form.

Petitioner would point out that the government's assessment of the penalties

provided by its indictment was not announced until after the verdict was returned. Moreover, though its vagueness was the subject of an unsuccessful pre-trial motion to dismiss, the indictment was clearly not subject to objection as being duplicitous inasmuch as it alleged only one conspiracy with multiple objectives. See, United States v. Grassi, 616 F.2d 1295 (5th Cir. 1980); United States v. Morrow, 717 F.2d 800 (3d Cir. 1983), cert. denied, 104 S.Ct. 975 (1983); and United States v. Quicksey, supra. The jury instructions were an accurate stateemnt of law and therefore not objectionable. Rather, error occurred when the government requested and the trial court imposed a penalty not necessarily supported by the jury verdict.

Due process whether in the form of fundamental fairness or particularized as the concept of "lenity" will not allow a

resolution of this question based on the defendant's failure to request a special verdict form. This approach merely evades the fundamental question of whether the court may infer that the jury had specifically intended to convict on the most punitive theory embraced by the multi-objective conspiracy indictment.

More to the point, the legitimacy of these considerations should be matters appropriately resolved by this Court as part of its resolution of the clear conflict between the case at bar and the recently reported case of United States v. Orozco-Prada, 732 F.2d 1076 (2d Cir. 1984). There is no meaningful distinction between the facts there and the case at bar. Defendant Eduardo Orozco was joined with others in a single count charging conspiracy to distribute and to possess with intent to distribute both schedule I and schedule II controlled substances, marijuana and cocaine. As

in the case at bar, the penalties attaching to either of these objects of the conspiracy are disparate. Possession with intent to distribute marijuana yields a maximum penalty of five years while a like charge involving cocaine allows for a maximum sentence of fifteen years. The defendant there was sentenced to eight years, a penalty in excess of the five years provided for the less punitive substantive offense involving marijuana.

There is no indication that the defendant sought to particularize the jury's verdict or the government's theory at trial. In fact, the defendant's argument on appeal was only that he should not have received a sentence higher than the maximum five years permitted for marijuana, because marijuana was the only controlled substance for which proof of at least one specific transaction was

offered. The Second Circuit not only disagreed with his contention that proof of a specific transaction was necessary, but it also found that there was at least one statement from the defendant to a government agent that might have led the jury to conclude that the underlying drug transactions included cocaine.

Nonetheless, the court concluded that the sentence was improper. The court cited, inter alia, Brown v. United States, supra, and United States v. Quicksey, supra, in its holding as follows:

> "Count One of the indictment charged Eduardo Orozco with a conspiracy punishable under both section 841(b)(1)(A) and section 841(b)(1)(B). The former section, which covers cocaine, authorizes a sentence of up to fifteen years; the latter, which covers marijuana, allows a sentence of up to five years. Eduardo Orozco's sentence of eight years was higher than the penalty authorized by section 841(b)(1)(B). But in the absence of a special verdict, there was

> no way for Judge Goettel to know whether the jury intended to convict Eduardo Orozco for a cocaine-related conspiracy, for a marijuana-related conspiracy, or for a conspiracy involving both drugs."

Following the procedure used in Quicksey and Brown, the court withheld judgment to allow the government to elect between reversal and resentencing under the less punitive theory.

As stated, the opinion of the Eleventh Circuit Court of Appeals in the case at bar is in direct conflict with the above-cited opinion of the Second Circuit Court of Appeals. The opinion here is also in substantial conflict with Brown v. United States and United States v. Quicksey as earlier cited.

The very common nature of the circumstances which frame this appeal as well as the subtlety of the issues presented thereby insure a continuing variety of

treatment by the lower courts. For the benefit of the petitioner herein as well as guidance to the bench and bar, the Court should offer reconciliation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Solicitor General, and to Robert W. Merkle, United States Attorney, by U. S. Mail, this 26th day of September, 1984.

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A P P E N D I X

UNITED STATES of America,
Plaintiff-Appellee,

v.

Wilson Tony HARRELL, James Hawkins,
Anthony Scire, Karl Heinz Harig,
Defendants-Appellants.

No. 82-3057.

United States Court of Appeals
Eleventh Circuit

July 30, 1984

Appeals from the United States District Court for the Middle District of Florida.

Before FAY, VANCE and HATCHETT, Circuit Judges.

VANCE, Circuit Judge:

For the second time in just over a year, we review convictions involving the Tampa chapter of the Outlaws Motorcycle Club.[1] Three of the four appellants in this case -- James Hawkins, Wilson Tony Harrell, and

1. In United States v. Cole, 704 F.2d 554 (11th Cir.1983), we affirmed the conviction of James Hawkins, among others, for offenses stemming from the operation of an interstate prostitution ring.

Karl Heinz Harig -- were color-wearing members of the chapter. Harrell (a/k/a "Roadblock" or "R.B.") was the chapter's apparent chief, while Hawkins ("Hawk") served as one of his top lieutenants and Haris ("Slow Karl") was a member of the rank-and-file. Tony Scire, who lived in Hialeah, Florida, allegedly supplied the chapter with cocaine for redistribution.

The prosecutions stem from a far-flung Outlaws drug distribution ring operated out of Tampa and Harrell's nearby lake-house. All four appellants were convicted on Count One, conspiracy to possess with intent to distribute cocaine, methaqualone, and/or amphetamine and methamphetamine. Harrell and Hawkins were also found guilty on Counts Two (possession with intent to distribute cocaine) and Three (a Travel Act violation); Hawkins and Scire were found guilty on Count Six (possession with intent to distribute cocaine). Harig was

acquitted on the latter count. We reverse Hawkins' conviction on Count Three. Finding no merit in the remaining contentions, we otherwise affirm.[2]

I. SUFFICIENCY OF THE INDICTMENT

The opening round of this appeal commences with a sixth amendment challenge to the indictment on grounds of vagueness, pressed by Harrell and Harig. Their fire is trained mainly on Count One, the conspiracy charge.[3]

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2. We have been aided little, if at all, by the government's brief, which substitutes abstract platitudes and conclusory statements for factual discussion and legal analysis.

3. Count One reads as follows:

> Count One
>
> From on or about January, 1978 to on or about December 1981, the exact dates being to the Grand Jury unknown, at Tampa, in the Middle District of Florida, and elsewhere, the defendants
>
> WILSON TONY HARRELL, a/k/a "Roadblock"
> JOHN JOSEPH HALL, a/k/a "J.J."
> JAMES HAWKINS, a/k/a "Hawk"
> LEONARD BRAUND
> PAUL WILLIAM GRABER, a/k/a "Mouse"
> ANTHONY "Tony" SCIRE
> KARL HEINZ HARIG, a/k/a "Slow Karl"

We begin by observing that an indictment will pass constitutional muster:

> if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.

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knowingly, willfully and unlawfully did conspire, combine, confederate and agree among themselves and with others both known and unknown to the grand jury to possess with the intent to distribute certain controlled substances, including:

(a) cocaine, a Schedule II controlled substance and narcotic drug;

(b) methaqualone, a Schedule II controlled substance and

(c) amphetamine and methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

It was a part of the manner and means by which this conspiracy was to be carried on and its objectives accomplished that at all times material hereto:

(1) defendants Hall, Hawkins and Harrell initiated, organized, planned, directed, managed and supervised their co-conspirators in a pattern of controlled substance dealings;

(2) the participants in this conspiracy were members of, or associated with the Outlaw Motorcycle Club, and as such members, these participants paid dues to the club and owed the

Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974); see Russell v. United States, 369 U.S. 749, 761, 82 S.Ct. 1038, 1045, 8 L.Ed.2d 240 (1962). An indictment that tracks the wording of the statute under which an offense is charged will meet these constitutional requirements if the language sets forth the essential elements

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club certain loyalties, debts and services;

(3) monies received as a result of controlled substances dealings were used to pay dues to, expenses of, and otherwise support the existence of and activities of, the club, including the payment of legal fees for participants who faced criminal charges;

(4) controlled substances were supplied to club members for "partying", as a means of rewarding and promoting loyalty to the club and its criminal purposes;

(5) violence and threats of violence were used to further the business of trafficking in controlled substances, to insure the loyalty and silence of participants in the conspiracy, and to punish club members who broke club discipline.

All in violation of Title 21, United States Code, sections 841(a)(1) and 846.

of the crime, Hamling, 418 U.S. at 117, 94 S.Ct. at 2904, and adequately specifies the time, place and participants involved, United States v. Ramos, 666 F.2d 469, 474 (11th Cir.1982). Furthermore, an indictment for conspiracy need not be as specific as an indictment for a substantive count. United States v. Yonn, 702 F.2d 1341, 1348 (11th Cir.), cert. denied, _____ U.S. _____, 104 S.Ct. 283, 78 L.Ed.2d 261 (1983).

In Yonn, an indictment of virtually identical specificity survived a motion to dismiss. See 702 F.2d at 1348; see also Ramos, 666 F.2d at 474-75. Because we are unable to make a principled distinction between this case and Yonn, we conclude

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We need not reach Harrell's objections to the sufficiency of the counts of which he stands acquitted, Counts Four and Five.

that appellants' salvo misses its mark.[4]

The next volley, a set of related discovery objections, merits only brief mention. Appellants complain that they did not receive a bill of particulars until seven working days before trial. Given the trial court's substantial discretion to deny a bill of particulars altogether, we discern no reason for complaint on appellants' part. This is especially true

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4. The specific deficiencies that appellants perceive are mere phantoms. Although Count One correctly recounts the period January 1978 to December 1981 as the timespan of the conspiracy, Harrell argues that this timeframe, by virtue of its sheer length, rendered the count vague. Harrell does not deny, however, that the government adduced proof implicating him in the conspiracy throughout the entire 48-month period. Nor was the time allegation fatally open-ended, as was the case in United States v. Cecil, 608 F.2d 1294 (9th Cir.1979). See United States v. Tavelman, 650 F.2d 1133, 1137 (9th Cir.1981), cert. denied, 455 U.S. 939, 102 S.Ct. 1429, 71 L.Ed.2d 649 (1982).

Cohort Harig argues that the 48-month timespan was vague with respect to him because the only proof against him concerned a four-month period in 1981. It

since the trial court's broad discretion is reversible only for actual surprise, United States v. Hawkins, 661 F.2d 436, 451-52 (5th Cir. Unit B 1981), cert. denied, 456 U.S. 991, 102 S.Ct. 2274, 73 L.Ed.2d 1287 (1982); United States v. Davis, 582 F.2d 947, 951 (5th Cir.1978), cert. denied, 441 U.S. 962, 99 S.Ct. 2408, 60 L.Ed.2d 1067 (1979), which appellants do not allege. Likewise, appellants were not entitled under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), to a

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is settled in this circuit, however, that proof of any date before the return of the indictment and within the statute of limitations, within reason, precludes a variance. United States v. Grapp, 653 F.2d 189, 195 (5th Cir. Unit A 1981). While the indictment was not the model of precision, we cannot say that the allegation was so vague as to require dismissal.

Appellants insist that the government was required under United States v. Diecidue, 603 F.2d 535 (5th Cir.1979), cert. denied, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 781 (1980), to allege the particular acts comprising the conspiracy. It is the law of this circuit, however, that no overt acts in further-

list of government witnesses or a list of statements attributed either to the defendants or to other co-conspirators in the absence of a claim that such information was exculpatory. United States v. Davis, 487 F.2d 112, 122 (5th Cir.1973), cert. denied, 415 U.S. 981, 94 S.Ct. 1573, 39 L.Ed.2d 878 (1974).

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ance of a conspiracy need be alleged in order to survive a motion to dismiss. United States v. Marable, 578 F.2d 151, 154 (5th Cir.1978). The specificity that Diecidue requires is only that detail necessary to set forth the elements of the offense charged, as opposed to the evidentiary details establishing the commission of the crime. 603 F.2d at 547. That was done here. Appellants' argument that Count Three contains an adequate allegation of location is equally misguided. In Yonn we approved an indictment that alleged criminal activity "in the Northern District of Florida and elsewhere." 702 F.2d at 1348. In light of that holding, we discern no deficiency in Count Three, which alleged travel in violation of the Travel Act "from the Middle District of Florida to Oklahoma City, Oklahoma."

II. SEVERANCE

Harig urges that the trial court erred in refusing his motion for severance under Fed.R.Crim.P. 14. His burden on review is a heavy one. Denial of severance under Rule 14 is within the broad discretion of the trial court and is reversible only for abuse of that discretion. United States v. DeSimone, 660 F.2d 532, 539 (5th Cir. Unit B 1981), cert. denied, 455 U.S. 1027, 102 S.Ct. 1732, 72 L.Ed.2d 149 (1982). Because any joinder works a certain degree of inherent prejudice, denial of severance is subject to reversal only if the defendant musters proof that compelling prejudice flowed from the joinder. United States v. Bright, 630 F.2d 804, 813 (5th Cir.1980).

Harig downplays his role in the unfolding conspiracy, describing himself as a "bit player". As a first ground for severance, he argues that he suffered compelling prejudice from the spillover effect of the

far greater proof introduced against his co-defendants. A disparity in the quantum of proof, however, justifies severance only in the most extreme cases, as when a cautionary instruction could not furnish a cure. United States v. Johnson, 713 F.2d 633, 640 (11th Cir.1983), cert. denied, _____ U.S. _____, 104 S.Ct. 1447, 79 L.Ed.2d 766 (1984). This is not such a case. The verdict, which acquitted Harig of Count Six, firmly demonstrated the jury's ability to sift through the evidence and render the individualized determination of Harig's guilt that obviated severance. See United States v. Zicree, 605 F.2d 1381, 1389 (5th Cir.1979), cert. denied, 445 U.S. 966, 100 S.Ct. 1656, 64 L.Ed.2d 242 (1980).

Nor did co-defendant Hawkins' offer to testify for Harig at a separate trial require a different outcome. The defendant who asserts a need for a co-defendant's testimony must establish the following

predicate to demonstrate compelling prejudice requi ing severance:

> (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the co-defendant will in fact testify if the cases are severed.

United States v. Duzac, 622 F.2d 911, 912 (5th Cir.), cert. denied, 449 U.S. 1012, 101 S.Ct. 570, 66 L.Ed.2d 471 (1980). In support of his motion for severance, Harig submitted an affidavit signed by Hawkins that stated:

> The affiant has agreed and will be available to testify as a witness on behalf of Karl Heinz Harig as long as my constitutional rights are not jeopardized. I would be available in a separate trial and willing to testify as long as I am not on trial at the same time. If called during a joint trial, I will invoke my Fifth Amendment right to remain silent but in a separate trial would most likely testify. My testimony would be exculpatory in nature and would be relevant to the issue of innocence of KARL HEINZ HARIG. I will testify that KARL HEINZ HARIG has had no involvement with any controlled substance transactions.

These wisps of allegations are no less bare or conclusory than those that failed in

DeSimone, 660 F.2d at 539-40. We therefore hold that the trial court was well within its sound discretion to deny Harig's motion for severance.[5]

III. EVIDENTIARY RULINGS

Harrell and Harig freely admit that they were full-fledged members of the Tampa Outlaws Motorcycle Club, an organization that Harrell confesses is "virtually synonymous with criminal misconduct." On appeal, they level the lance of their allegiance at the government, charging that its introduction of vivid testimony portraying the often bizarre existence of the Outlaws was an unlawful attempt to prove their guilt by association. Appellants alternatively challenge the testimony as evidence of

5. Harig also argues that the trial court should have excluded damaging evidence because, according to Harig, the evidence was seized on the basis of a false tip provided by an unreliable informant and a search warrant that failed to specify adequately the room to be searched. We find no factual or legal merit in his contentions.

specific acts that was probative only of their propensity to commit crime, in violation of Fed.R.Evid. 404(b).[6]

At trial the government read the jury Count One of the indictment, which detailed allegations concerning the manner and means of the conspiracy charged. Testimony elicited at trial supported these allegations. Onetime Outlaw Jerry Luke Owens, when asked how he supported himself during his membership in the club, replied, "Same as anybody else, drugs and women." He admitted that no man in the Outlaw fraternity

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6. In United States v. Beechum, 582 F.2d 898 (5th Cir.1978)(en banc), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979), this court enunciated the following two-part test for determining the admissibility of proof of extrinsic offenses: (a) the extrinsic evidence must be relevant to an issue other than the defendant's character; (b) the probative value of the evidence must not be substantially outweighed by its undue prejudice and the evidence must meet the other requisites of rule 403. Id. at 911.

held a legitimate job and that the members instead lived off the profits of drug sales and the income their girlfriends and wives, better known as "old ladies", earned from forced prostitution.

Several former Outlaws who turned government witness testified to the violence and threats of force that were used to assure their silence. Paul Clendening, for one, decided to break off from the club a week after he was forced to move into the Outlaws clubhouse because he "got tired of getting beat up on and pushed around and all kind of stuff like that." When asked to identify the initials "G.F.O.D.", Clendening, echoed by witness William Barnes, replied: "God forgives; Outlaws don't." According to Clendening, the slogan referred to the Outlaws' Hammurabian code of an eye for an eye and a tooth for a tooth. As a consequence, both Clendening and Barnes joined the federal

witness relocation program in fear for their lives. On the stand, Barnes openly admitted that he had donned a false beard and dark glasses for his appearance at trial because he specifically feared Harrell's revenge. Melanie Platt, who became Harrell's "old lady" at age fourteen, testified that he once pummelled her after she ran away from him.

The government disputes that the above evidence constitutes proof of other crimes, wrongs or acts committed by Harrell, Harig or both so as to come within the purview and thus the restrictions of rule 404(b). It matters little, however, whether the rule encompasses the challenged testimony, since the evidence was ultimately used to "enhance the trier's understanding of the event, and not to prove propensity." 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 404[10] at 404-61 (1982); see United

States v. Mills, 704 F.2d 1553, 1559 (11th Cir.1983).[7]

We have no difficulty concluding that the testimony of the Outlaws' way of life was important in understanding the existence, motives and object of the drug-trafficking conspiracy and the means

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7. Although his brief is not entirely clear, it appears that Harrell predicates his evidentiary challenge solely on initial admissibility and does not argue that the probative value of the evidence adduced was substantially outweighed by undue prejudice for purposes of rule 403.

Harig argues that he was unjustifiably prejudiced when the government read certain portions of Count One to the jury. He first charges that paragraph 3 of Count One, which alleges that drug sale receipts were used to finance legal fees for participants who faced criminal charges, falsely imputed to Harig a prior arrest or criminal record. We disagree. The essence of the allegation was that some Outlaws, but not necessarily Harig, incurred legal fees that the club sought to pay. Harig's second objection to this passage is more substantial. He argues that the allegation impugned the credibility of defense counsel and therefore hampered its effectiveness by implying that counsel's pockets were lined with drug money. We conclude, however, that any doubt cast

through which it was conducted. Compare United States v. Arias-Diaz, 497 F.2d 165, 170 (5th Cir.1974), cert. denied, 420 U.S. 1003, 95 S.Ct. 1446, 43 L.Ed.2d 761 (1975). To explain these adequately, the government needed to establish that the Outlaw club and its members depended on drug revenues for their livelihood; that the club required an influx of new members to maintain its drug trafficking operations; and that it retained the loyalty and silence of old members with rewards of drugs on the one hand and intimidation on the other. The testimony of Outlaws practices was unquestionably admissible for these purposes. See Mills, 704 F.2d at 1558-59; United States v. Larson, 526 F.2d 256, 259 (5th Cir.), cert. denied, 429 U.S. 839, 97 S.Ct. 110, 50 L.Ed.2d 106 (1976); United States

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on defense counsel's integrity to Harig's prejudice was substantially outweighed by the relevance such evidence had to the conspirators' motives.

v. Hughes, 441 F.2d 12, 19-20 (5th Cir.), cert. denied, 404 U.S. 849, 92 S.Ct. 156, 30 L.Ed.2d 88 (1971). See generally United States v. Beechum, 582 F.2d 898, 911 n. 15 (5th Cir.1978)(en banc), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979).

Appellants' protestations of guilt by association was likewise to no avail. While an inference of conspiracy can never rest solely on ties of friendship or kin, such associations comprise one factor of many which may be considered in ascertaining the existence of a conspiracy. United States v. Cole, 704 F.2d 554, 557 (11th Cir.1983).

Harrell further argues that an unsolicited reference by witness Barnes to Harrell's arrest record compels reversal of his convictions. On direct examination, the prosecutor asked Barnes, an Outlaws drug runner, where he obtained his wares:

> Q. Now, when you went to the lake house, who would you get the drugs from?
>
> A. Well, at first, I was just getting them off of JJ. Roadblock was in jail and one to three days after he had gotten out of jail, I went out and --

The trial court denied Harrell's motion for a mistrial. In lieu thereof it offered a cautionary instruction, which counsel twice declined.

Barnes' remark was testimony of Harrell's character, which should have been excluded because Harrell had not previously placed his character in dispute. See United States v. Warf, 529 F.2d 1170 (5th Cir. 1976). We cannot say that the testimony was beyond the curative powers of an instruction, however,[8] so as to exert a substantial impact on the jury's verdict. Given the overwhelming proof of Harrell's guilt, we conclude that the error was

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8. Compare United States v. Klein, 546 F.2d 1259, 1263 (5th Cir. 1977).

harmless. See United States v. Chilcote, 724 F.2d 1498, 1502 (11th Cir.1984); United States v. Klein, 546 F.2d 1259, 1263 (5th Cir.1977).

Harrell's final evidentiary objection concerns the necessary predicate to identify illicit drugs. According to Harrell, a witness who testified about controlled substances must swear to having used the drug on the occasion in question as well as to familiarity based on prior use or sale. The law of this circuit, however, takes a more expansive view. Identification of a controlled substance does not require direct evidence if available circumstantial evidence establishes its identity beyond a reasonable doubt. Such evidence can include lay experience based on familiarity through prior use, trading, or law enforcement; a high sales price; on-the-scene remarks by a conspirator identifying the substance as a drug; and behavior charac-

teristic of sales and use such as testing, weighing, cutting and peculiar ingestion. United States v. Sanchez, 722 F.2d 1501, 1506 (11th Cir.1984); United States v. Crisp, 563 F.2d 1242, 1244 (5th Cir.1977); United States v. Quesada, 512 F.2d 1043, 1045 (5th Cir.), cert. denied, 423 U.S. 946, 96 S.Ct. 356, 46 L.Ed.2d 277 (1975). Identification based on past use coupled with present observation of the substance at hand will suffice to establish the illicit nature of a suspected substance. The testimony to which Harrell objects falls within these bounds.[9]

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9. Jerry Luke Owens testified that he became a user and pusher of an assortment of drugs, including cocaine, amphetamines, and quaaludes, long before he joined the Tampa chapter. Such experience qualified him to tell of trips he made to Oklahoma City and Detroit to sell cocaine and quaaludes. William Barnes, who testified that he bought speed from Harrell at $500 an ounce, was thereby qualified to relate the story of his courier runs to New Orleans for resale. Paul Clendening admitted that he already was a frequent cocaine

IV. SUFFICIENCY OF THE EVIDENCE

Appellants Scire and Hawkins urged reversal on grounds of insufficiency of the evidence. On review, we must affirm if the evidence and the inferences it supports, viewed in the light most favorable to the government, would permit a reasonable trier of fact to establish guilt beyond a reasonable doubt. Such evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt. United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982)(en banc), aff'd, _____ U.S. _____, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

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user by the time he met the Tampa Outlaws. This testimony of habitual use coupled with observations of Harrell's characteristic behavior qualified Clendening to identify the substance that he observed Harrell snorting at a Fort Myers, Florida party as cocaine. Harrell's onetime "old lady," Melanie Platt, testified that she recognized from prior personal use the substances Harrell had her ply at bars as speed, quaaludes and "tea".

Applying this standard, we affirm as to Scire and reverse in part as to Hawkins.

A. Tony Scire

Scire was convicted under Counts One and Six, respectively, of conspiracy to possess with intent to distribute controlled substances and possession with intent to distribute cocaine. At trial he was the sole defendant to take the stand. Scire portrayed himself as a mild-mannered south Florida businessman who lived alone next door to his mother with no companionship except for his attack dog Gina. Although not an Outlaw himself, he and Hawkins were good friends. The two, inveterate gamblers, frequently met and placed bets at racetracks in Florida, Kentucky and elsewhere. Scire admitted his gambling association with Hawkins, but adamantly denied any involvement in Outlaws drug trafficking.

Other Outlaws came to know or know of Scire through Hawkins. Their testimony

painted a different picture of Scire's dealings. Jerry Luke Owens, for instance, worked for Hawkins as a drug courier to Detroit in 1980. Owens testified that, according to Hawkins, a "Tony" in Miami or south Florida supplied the bulk cocaine that Owens sold.

Government witness Paul Clendening met Scire through Hawkins. Beginning in September 1981, after Clendening moved into Hawkins' house in Tampa, Hawkins began taking the Outlaws recruit to Miami for the stated purpose of visiting Scire and obtaining cocaine. The pair made a total of four trips. Clendening testified that Hawkins carried cocaine only on the return leg. On the first trip, Clendening testified, Hawkins arrived at Scire's house and asked where he could get some cocaine. Scire replied that he didn't know, but that he would check into it. He and Hawkins then disappeared into Scire's bed-

room. Hawkins emerged with a quarter ounce of cocaine. After an overnight stay at Scire's home, Hawkins and Clendening returned to Tampa, where they weighed the cocaine, cut it with procaine, and bottled it for sale.

On each of the following three visits, according to Clendening, Hawkins asked Scire whether he could procure some cocaine, with varying results. On the second return trip, Hawkins produced cocaine from a folded paper towel and snorted it with Clendening in a gas station men's room. The following time Scire promised to "check into" getting some cocaine, but none materialized. The fourth visit was entirely unproductive: Scire told Hawkins that the supply was "dry, there wasn't any."

On appeal Scire argues that the evidence establishes at best that Scire provided Hawkins with cocaine for personal use rather than for large-scale distribution.

According to Scire, the quarter ounce of cocaine Hawkins obtained on the first trip was too small a quantity to demonstrate an agreement to join a massive drug distribution ring. Alternatively, he argues that Hawkins' agreement to buy what Scire had to sell, standing alone, does not establish the joint objective necessary to prove a conspiracy.

These arguments miss the mark. The evidence shows involvement far beyond one or two isolated sales. The government offered testimony from which a reasonable jury could infer that Scire supplied Hawkins with cocaine for distribution to Detroit and elsewhere as early as 1980. During Clendening's 1981 visits to Scire's house, Scire's consistent agreeability to "checking into" cocaine confirms that he extended his hospitality to the Outlaw callers to the extent of transacting drug sales. Although Hawkins returned from Miami with

what seemed to be a small supply of cocaine, the first trip nevertheless yielded enough to cut and prepare for resale. From these facts, taken together, the jury could have reasonably concluded that Scire had an ongoing agreement to supply Hawkins with cocaine for redistribution.[10] Compare United States v. Mancillas, 580 F.2d 1301, 1307 (7th Cir.), cert. denied, 439 U.S. 958, 99 S.Ct. 361, 58 L.Ed.2d 351 (1978) with United States v. Caro, 569 F.2d 411, 418-19 (5th Cir.1978). The evidence likewise supports Scire's conviction on the substantive count.

B. James Hawkins

Hawkins' sufficiency challenges are directed at his convictions on Counts Two and

10. Scire argues that a reasonable jury would have to entertain a reasonable doubt whether Scire was the one who supplied Hawkins with cocaine. Owens' testimony coupled with the bedroom scene adequately refutes this argument under the guidance of Bell.

Three. Finding no merit in his claim regarding Count Two, we affirm. We reverse as to Count Three.

Count Three charged that "[i]n or about February, 1980," Harrell, Hall and Hawkins "did travel and cause travel in interstate commerce from the Middle District of Florida to Oklahoma City, Oklahoma" in violation of the Travel Act. The evidence relating to this charge consists of three courier runs Jerry Luke Owens made on Harrell's behalf to deliver drugs to Oklahoma City. The Oklahoma City route ended with Owens' arrest on February 18, 1980.

Hawkins argues that the evidence linking him to Harrell, Hall or the Tampa Outlaws on or before the date of Owens' arrest is too scant to support his conviction on Count Three. Owens testified that he joined the Tampa Outlaws "about '78" and left the chapter "in the summer of '80."

He recalled meeting Hawkins after joining the Tampa chapter, but he could not remember when. Owens was asked who witnessed his conversations with Harrell about the Oklahoma City trips, and the following exchange ensued:

> Q. Do you remember if anybody else was there when Roadblock talked to you about going to Oklahoma City?
>
> A. Well, his partners was usually around.
>
> Q. And based on your observation, who are you referring to by his partners?
>
> A. J.J. and Hawk [Hawkins].

The first firm evidence implicating Hawkins in Tampa Outlaws drug dealing dates from the summer of 1980, when Hawkins drove Owens to Detroit in his Lincoln for a two-week trip to peddle cocaine and quaaludes. In recounting the story of this trip, Owens admitted that he was having difficulty remembering dates. He could remember when the Detriot trip occurred only by recalling that

"the cherries were ripe in Detroit at the time." Detective Grady Snyder of the Tampa Police Department, who had monitored Outlaw activities since 1976, stated that he first heard that Hawkins was in the Tampa area in September 1980. Although Hawkins told Paul Clendening in 1981 that he, J.J. Hall and Harrell were partners in cocaine dealing, the record establishes that Hawkins was the last of the three to join the enterprise.

We agree that this evidence is too slender a reed to support Hawkins' conviction of the Oklahoma City Travel Act violation. The fact that Harrell's partners were "usually around" and that Owens regarded Hall and Hawkins as Harrell's partners cannot prove that Hawkins was present at any of the courier meetings in question. At best, the evidence establisher that Owens did not know when Hawkins arrived in Tampa, but that after he did arrive, he was usually present during Harrell's discussions

with couriers. Owens' testimony necessarily leaves reasonable doubts whether Hawkins actually listened in on the Oklahoma City conversations.

Nor is Hawkins liable as a principal for substantive offenses committed and completed before he joined the drug trafficking conspiracy. "[A] latecomer cannot be convicted as a principal for substantive offenses which were committed in furtherance of the conspiracy before he joined it or after he withdrew from it." Gradsky v. United States, 376 F.2d 993, 996 (5th Cir.), vacated in part on other grounds, 389 U.S. 18, 88 S.Ct. 1, 19 L.Ed.2d 18, cert. denied, 389 U.S. 908, 88 S.Ct. 224, 19 L.Ed.2d 224 (1967); see Levine v. United States, 383 U.S. 265, 86 S.Ct. 925, 15 L.Ed.2d 737 (1966); United States v. Knippenberg, 502 F.2d 1056, 1059-60 (7th Cir.1974); United States v. Apollo, 476 F.2d 156, 162 (5th Cir.1973). We therefore reverse as to

Count Three.

The proof of the Detroit trip requires affirmance of Hawkins' conviction on Count Two. That count charged Hawkins, Harrell and Hall with knowingly possessing with intent to distribute cocaine "[i]n or about February 1980 . . . at Tampa in the Middle District of Florida." The evidence adduced at trial established possession during summer 1980 at the earliest, rather than in February 1980 as alleged in the indictment. A variance between dates alleged and dates proved will not trigger reversal, however, as long as the date proved falls within the statute of limitations and before the return date of the indictment. United States v. Phillips, 664 F.2d 971, 1036 (5th Cir. Unit B 1981), cert. denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). Because we detect no likelihood that the variance subjected Hawkins to undue surprise or exposed him to

the possibility of a second prosecution for the same offense, see id., we affirm.

V. REDUCTION OF SENTENCE

The final contention pressed on appeal contests the length of sentences imposed under Count One. Harrell and Hawkins were both sentenced to fifteen years under that count for conspiring to violate the substantive prohibitions of 21 U.S.C. § 841(a)(1). Section 846, the companion sentencing provision, limits the punishment for that offense to the maximum punishment prescribed for the offense whose commission constituted the object of the conspiracy. The maximum sentence for a first conviction of possession with intent to distribute cocaine is imprisonment for fifteen years and a fine of $25,000. Id. § 841(b)(1)(A). The remaining controlled substances violations carry a maximum prison sentence of five years and a fine of $15,000. Id. § 841(b)(1)(B).

Appellants argue that the inherent ambiguity of the general verdict made it impossible to determine whether the conspiracy as found had single or multiple objects, and what those objects were. Because the government did not request a special verdict to clarify which drugs comprised the objects of the conspiracy as found, and because the trial court framed its instruction in the disjunctive, allowing the jury to convict if it found a conspiracy to distribute either methaqualone, amphetamine, methamphetamine, or cocaine, appellants maintain that it is impossible to ascertain with certainty whether cocaine was or was not an object. Arguing that their punishment thus must be restricted to the five-year maximum sentence allowable when cocaine is not involved, they conclude that their sentences are illegal.

Appellants overlook one critical point: their failure to raise this issue at trial,

through either an objection to the form of the indictment, a request for a special verdict, compare United States v. Gomez-Geraldo, 652 F.2d 452 (5th Cir. Unit B 1981), or an objection to jury instructions. Since the imposition of such a sentence does not amount to clear and prejudicial error, reversal in the absence of an objection is not warranted. See United States v. Vincent, 648 F.2d 1046, 1050 (5th Cir. Unit A 1981)(lesser included offense instructions); Williams v. United States, 238 F.2d 215 (5th Cir.1956)(same), cert. denied, 352 U.S. 1024, 77 S.Ct. 589, 1 L.Ed.2d 596 (1957); 8 J. Moore, Moore's Federal Practice, § 8.03[2], at 8-10 (2d ed. 1983).

VI. CONCLUSION

To summarize, we reverse Hawkins' conviction on Count Three. We affirm the trial court in all other respects.

AFFIRMED IN PART AND REVERSED IN PART.

(2) (1)

Nos. 84-693 and 84-5748

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In the Supreme Court of the United States

OCTOBER TERM, 1984

WILSON TONY HARRELL, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES HAWKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant who is convicted by a general verdict on one count of conspiring to distribute cocaine and other controlled substances, in violation of 21 U.S.C. 841(a) and 846, may be sentenced to the more severe penalty authorized where the object of the conspiracy is distribution of cocaine, rather than only to the lesser penalty for conspiracy to distribute the other controlled substances.

2. Whether a conviction on one charge may be affirmed in part on the basis of evidence related to other charges upon which the defendant has been acquitted.

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In the Supreme Court of the United States

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 737 F.2d 971.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1984. A petition for rehearing by petitioner Hawkins was denied on September 21, 1984. The petition for a writ of certiorari in No. 84-693 was filed on September 27, 1984; the petition in No. 84-5748 was filed on November 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted on one count of conspiracy to possess with intent to distribute several controlled substances, in violation of 21 U.S.C. 846 (Count One); one count of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count Two); and one Travel Act count, in violation of 18 U.S.C. 1952 (Count Three). Petitioner Hawkins also was convicted on an additional count of possession of cocaine with intent to distribute (Count Six).[1] Petitioner Harrell was sentenced to 15 years' incarceration on Count One, 15 years' incarceration followed by a 10-year special parole term on Count Two, and five years' incarceration on Count Three, the sentences to run consecutively. Petitioner Hawkins was given concurrent sentences of 15 years' incarceration on Counts One and Two, to be followed by consecutive sentences of five and 15 years' incarceration on Counts Three and Six, respectively. He also received 10-year special parole terms on Counts Two and Six. The court of appeals reversed Hawkins' conviction on Count Three; it affirmed petitioners' other convictions, as well as their sentences. Pet. App. A1-A36.[2]

The evidence at trial established that petitioners operated a far-flung drug distribution ring involving cocaine and other controlled substances (Pet. App. A2). As one part of this enterprise, one of petitioners' couriers made several trips from Florida to Oklahoma City in early 1980 to distribute drugs (*id.* at A29). Later that year, Hawkins drove the courier to Detroit to sell cocaine and quaaludes (*id.* at

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[1]Both petitioners were acquitted on Count Four, which charged possession with intent to distribute methaqualone, and on Count Five, another Travel Act count.

[2]"Pet. App." refers to the appendix to petition, No. 84-693.

A30, A33). At the close of trial, the district judge instructed the jury on the conspiracy count that it is "unlawful for any person to knowingly and willfully possess the substances Methaqualone, Amphetamine, Methamphetamine, or Cocaine with intent to distribute" (84-693 Pet. 5). The jury returned a general guilty verdict on the conspiracy count, as well as on several substantive counts.

On appeal, the Eleventh Circuit rejected Hawkins' challenge to his conviction on Count Two, which charged possession of cocaine with intent to distribute "[i]n or about February 1980" (Pet. App. A33). The court found that Hawkins had possessed cocaine when he drove the courier to Detroit in the summer of 1980, and it concluded that the variance between the date in the indictment and the date proved at trial did not "subject[] Hawkins to undue surprise or expose[] him to the possibility of a second prosecution for the same offense" (*id.* at A33-A34).[3] The court of appeals also rejected both petitioners' arguments that they should not have been sentenced under the statutory provisions directed at conspiracy to traffic in cocaine (21 U.S.C. 841(b)(1)(A)). Petitioners argued that Count One of the indictment charged conspiracy to distribute several types of controlled substances, so that the jurors might have voted to convict without specifically finding that petitioners conspired to traffic in cocaine. But the court of appeals noted that petitioners had failed to object to the form of the indictment or to the jury instructions, and had not requested a special verdict. Because the sentencing issue had not been properly preserved, the court held that reversal was not warranted (Pet. App. A35-A36).

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[3]The court overturned Hawkins' conviction on Count Three, which was grounded on the courier's trips to Oklahoma City, because it found that Hawkins did not join the distribution ring until after that distribution (Pet. App. A30-A32).

ARGUMENT

1. In this Court, petitioners again challenge the sentences imposed under Count One. They base their arguments on the penalty provisions of 21 U.S.C. 841, which set forth the sanctions for violations of 21 U.S.C. 846. Section 841(b)(1)(A) sets the maximum sentence for a conviction involving cocaine at 15 years' imprisonment and a $25,000 fine. But Section 841(b)(1)(B) sets a maximum sentence of only five years' imprisonment and a $15,000 fine for trafficking in methaqualone, amphetamine, and methamphetamine — the other drugs listed in Count One of petitioners' indictment. Because the district court framed its instructions in the disjunctive and the jury returned a general verdict, petitioners assert that the jury may have believed them to be guilty of conspiring to distribute only controlled substances other than cocaine. Hypothesizing this possibility, they contend that the district court could not lawfully have imposed sentences in excess of those authorized by Section 841(b)(1)(B) on the basis of such a verdict.[4]

This contention, which in the abstract is identical to the argument raised in the petition for certiorari in *Beasley* v. *United States,* cert. denied, No. 84-409 (Jan. 21, 1985), misapprehends the nature of 21 U.S.C. 841. As we explained in our brief in opposition in *Beasley* (at 5-8), a copy of which is being served on petitioners' counsel, the language, structure and legislative history of the statute suggest that the type of controlled substance distributed by the defendant is not one of the elements of a Section 841 offense that must be

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[4]This contention, if meritorious, would nevertheless not affect the sentence imposed upon petitioner Hawkins unless he also succeeds in his attack upon his conviction on Count 2. The claim affects the validity of the sentence only on Count 1, but Hawkins received an equal and concurrent sentence on Count Two for possession, specifically, of cocaine.

found by the jury. Instead, the elements for jury determination are described in Section 841(a), which in relevant part makes it a crime simply to "possess with intent to * * * distribute * * * a controlled substance." Section 841(b) then sets out the sanctions to be applied by the district court when an offense of the type described in Section 841(a) has been proved; it establishes the range of penalties that may be imposed for trafficking in various types of controlled substances. The nature of the substance involved therefore is relevant only to the trial judge's sentencing determination.[5]

While petitioners maintain that a conflict among the circuits exists on this point, they have failed to demonstrate that their conspiracy sentences would have been found improper by *any* court of appeals. For example, in *United States* v. *Orozco-Prada*, 732 F.2d 1076 (2d Cir. 1984), upon which petitioners principally rely (84-693 Pet. 15-18; 84-5748 Pet. 5), the Second Circuit held it improper to sentence a defendant under Section 841(b)(1)(A) for participation in a cocaine-related conspiracy when the indictment charged a conspiracy to distribute both marijuana and cocaine, and the jury returned a general verdict. 732 F.2d at 1083-1084. But the court of appeals expressly noted that its conclusion might have been different had the defendant "also [been] convicted of substantive drug offenses carrying fifteen-year sentences," because had " 'the jury convicted defendant of the [substantive] offenses . . . that [are] the object[] of the

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[5]This conclusion is consistent with the uniform holdings of the courts of appeals that a defendant need not know the precise nature of the drug he possesses to violate Section 841(a)(1), which refers only to "a controlled substance." *E.g.*, *United States* v. *Lopez-Martinez*, 725 F.2d 471, 472-475 (9th Cir. 1984), cert. denied, No. 83-6565 (Oct. 1, 1984); *United States* v. *Berwick*, 710 F.2d 1035, 1040 (5th Cir. 1983); *United States* v. *Lewis*, 676 F.2d 508, 512 (11th Cir. 1982); *United States* v. *Morales*, 577 F.2d 769, 776 (2d Cir. 1978).

alleged conspiracy, it [would have been] reasonable to conclude that the jury found defendant guilty of a conspiracy to commit [those] substantive offenses.' " *Id.* at 1084, quoting *United States* v. *Peters,* 617 F.2d 503, 506 (7th Cir. 1980).

The petitioners here fall squarely within this exception. Both were convicted on substantive counts of possession of cocaine with intent to distribute. This conduct, of course, was one of the objects of the conspiracy charged in Count One of the indictment. The Second Circuit therefore presumably would have " 'conclude[d] that the jury [had] found [petitioners] guilty of a conspiracy to commit [that] substantive offense[]' " (732 F.2d at 1084, quoting *Peters,* 617 F.2d at 506), and consequently would have affirmed their sentences. Petitioners' claim likewise would have been unsuccessful in the Tenth Circuit, which has held that the factors set out in Section 841(b) are relevant only to sentencing proceedings. *United States* v. *Dickey,* 736 F.2d 571 (10th Cir. 1984), cert. denied, No. 84-409 (Jan. 21, 1985).[6]

In any event, it would be premature for this Court to reconcile any arguable inconsistency between the views of the Eleventh Circuit and those of other courts of appeals on this issue. As we noted in *Beasley* (Br. in Op. 8 n.8), the Eleventh Circuit has addressed the nature of Section 841 in three recent decisions. In *United States* v. *Simmons,* 725 F.2d 641, 643-644 (11th Cir. 1984), cert. denied, No. 83-1942 (Oct. 1, 1984), the court of appeals stated that the factors set out in Section 841(b) are "applicable only to the

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[6]The other purportedly conflicting decisions cited by petitioners — *United States* v. *Quicksey,* 525 F.2d 337 (4th Cir. 1975), cert. denied, 423 U.S. 1087 (1976), and *Brown* v. *United States,* 299 F.2d 438 (D.C. Cir.), cert. denied, 370 U.S. 946 (1962) — are not on point. Neither case involved an indictment charging conspiracy to traffic in two different types of controlled substances; as a result, neither addressed the language or legislative history of Section 841.

sentencing phase." In *United States* v. *Alvarez*, 735 F.2d 461 (11th Cir. 1984), the court held that, when an indictment charges a conspiracy to distribute both cocaine and marijuana, the return of a general guilty verdict does not authorize imposition of an enhanced sentence. And in this case the court of appeals took a third course, holding in similar circumstances that reduction of a defendant's sentence is inappropriate when the defendant fails to complain about the form of the indictment or to request a special verdict at trial. These cases were decided virtually contemporaneously with each other, though none cites or discusses the others. It therefore would be appropriate for this Court to allow the Eleventh Circuit to formulate a settled rule on when enhanced penalties may be awarded under Section 841 before determining whether its rule creates a conflict requiring further review.[7]

2. Petitioner Hawkins also asserts that the court of appeals should have overturned his conviction on Count Two for insufficient evidence. He notes that the jury acquitted him on Counts Four and Five, which involved his trip to Detroit in the summer of 1980. He therefore maintains that the court of appeals erred in relying on evidence relating to the Detroit transaction in upholding his conviction under Count Two. This argument is without merit.

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[7]Indeed, even if the Court were to conclude that review of the sentencing issue otherwise would be warranted, this case presents a particularly poor vehicle with which to address the question. Because the court of appeals concluded that petitioners had failed to preserve their sentencing objections, it did not discuss the meaning of Section 841. Review of the issue would be more appropriate in a case in which the question had been properly presented and fully considered by the court of appeals, and in which the jury's verdicts on other counts do not confirm that its guilty verdict on the conspiracy charge reflected a finding that supports the greater sentence.

Count Four of the indictment simply alleged that, while in Tampa, Florida during the summer of 1980, Hawkins possessed methaqualone with the intent to distribute it. Count Five alleged that Hawkins traveled to Detroit to establish a business enterprise involving controlled substances. The jury's acquittal of Hawkins on these two charges says nothing about its views on Count Two, which alleged that, while in Tampa "[i]n or about February, 1980," Hawkins possessed cocaine with intent to distribute it. The court of appeals therefore could properly have considered evidence relating to the Detroit trip, as well as other evidence in the record (see Tr. 256, 456-460, 469-470, 577, 585), in concluding that a rational trier of fact could have found that Hawkins possessed cocaine in Tampa. See *Jackson* v. *Virginia,* 443 U.S. 307, 319 (1979). And even if the verdicts were factually inconsistent, that would afford no ground for relief. *United States* v. *Powell,* No. 83-1307 (Dec. 10, 1984).[8] In any event, this factual issue does not warrant further review.

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[8]Similarly, Hawkins is incorrect in contending (84-5748, Pet. 7) that the court was required to overturn his conviction on Count Two once it had decided to vacate his conviction on Count Three. While the court found insufficient evidence to prove that Hawkins was participating in a criminal enterprise in February 1980, Hawkins has offered no reason to believe that he was prejudiced by the variance between the date set out in Count Two ("[i]n or about February") and the court of appeals' finding that he possessed cocaine in the summer of 1980.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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